UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JANE DOE, a Minor, Plaintiff, v. FERNANDEZ FOOD SERVICES, INC., an Illinois corporation; LA MAGDALENA, INC. an Illinois corporation; LA MAGDALENA II, INC. an Illinois corporation; LA MAGDALENA III, INC. an Illinois corporation; ADDISON RESTAURANT SERVICES, INC., an Illinois corporation d/b/a LA HACIENDA DE LOS HERNANDEZ; BESA MI TACO, INC., an Illinois Corporation, Defendants.	)	Case No. 08 C 1149 Judge: Elaine Bucklo Magistrate Judge: Nan Nolan

DEFENDANT'S MEMORANDUM FILED IN SUPPORT OF ITS CONSOLIDATED MOTIONS TO DISMISS PURSUANT TO FRCP 12(b)(6) OR IN THE ALTERNATIVE FOR LEAVE TO FILE AN EXPEDITED MOTION FOR SUMMARY ON A LIMITED ISSUE

Defendants, FERNANDEZ FOOD SERVICES, INC. (FERNANDEZ), LA MAGDALENA, INC. (LM I), LA MAGDALENA II, INC. (LM II), LA MAGDALENA III, INC. (LM III), ADDISON RESTAURANT SERVICES, INC. d/b/a LA HACIENDA DE LOS HERNANDEZ (ADDISON), BESA MI TACO, INC. (BMTI), for their Memorandum, state:

I. FRCP 12(b)(6) Standard

A Motion to Dismiss tests the legal sufficiency of the Complaint and not the merits of the suit. *Gibson v. Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). A plaintiff fails to state a claim upon which relief may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Leahy v. Board of Trustees of Community College Dist. No. 508*, 912 F.2d 917, 921 (7th Cir. 1990). The Court

accepts as true all well-pleaded factual allegations and draws reasonable inferences in favor of the plaintiff. *Prince v. Rescorp. Realty*, 940 F.2d 1104, 1106 (7th Cir. 1991). The Court, however, is "not obliged to ignore any facts set forth in the complaint that undermine the plaintiff's claim or assign any weight to unsupported conclusions of law." *R.J.R. Services Inc. v. Aetna Cas. and Sur. Co*., 895 F.2d 279, 281, (7th Cir. 1989). A complaint which consists merely of conclusionary allegations unsupported by factual assertions fails even the liberal federal standard of notice pleading. *Palda v. General Dynamics Corp*., 47 F.3d 872, 875 (7th Cir. 1995).

II. Allegations of Plaintiff's Complaint

Plaintiff alleges that DOE, a female minor, was hired as a hostess to work in Defendants' restaurant LA MAGDALENA in Elk Grove Village in April, 2006. (Complaint paragraphs 4, 5 and 25). DOE is alleged to report to supervisor FERNANDO LOPEZ (LOPEZ) who allegedly made unwelcome, unwanted, and repeatedly sexually suggestive comments to her, advances, touching and that DOE and LOPEZ engaged in sexual relations. (Complaint paragraphs 26-28). Plaintiff alleges that Defendant ADDISON splintered a business enterprise into multiple corporations so as to defeat Federal anti-discrimination laws and that "ADDISON either directed, condoned or ratified the subsidiary corporations' practice of integrating the labor forces between the restaurants." (Complaint paragraphs 33, 34). As to the other named corporate Defendants, Plaintiff only alleges for each of them that they are an Illinois corporation engaged in the restaurant business, qualified to and doing business in Illinois and further alleges that each is "an employer as that term is defined under the Civil Rights Act of 1964, as Amended, 42 U.S.C. §2000(e)(b)." (Complaint paragraphs 6-23). Although Plaintiff alleges that each of the six named corporate Defendants are "employers" as defined by Title VII (i.e., fifteen or more

employees for at least twenty weeks during 2005 and 2006) Plaintiff does not allege that DOE was actually within the employ of any of them. Of the six named corporations, Plaintiff points to Defendant ADDISON as having responsibility for splintering the business enterprises into multiple corporations so as to avoid financial liability. No allegations are made by Plaintiff which connect any of the other five corporate entities to LOPEZ, DOE or any of the allegations contained within the Complaint

III. Application of *Papa* to Plaintiff's Complaint

In *Papa v. Katy Industries, Inc.*, 166 F.3d 937 (7th Cir. 1999), the Seventh Circuit rejected the "integrated enterprise" theory and determined that there are three limited situations in which the presence of an affiliated corporation will vitiate the small-employer exemption: where the traditional conditions for piercing the corporate veil exist; where discreet entities are created for the express purpose of avoiding liability under the Federal anti-discrimination laws; and where an affiliate directs the discriminatory act, practice or policy. *Papa*, 166 F.3d at 940-43.

Plaintiff's Complaint at paragraphs 33 and 34 make allegations which purport to comply with the second and third requirements of *Papa* for the liability of ADDISON as a nominal employer. However, no such allegations are made as to any of the other five corporations named in the Complaint. Therefore, Plaintiff's Complaint could stand only as to Defendant ADDISON and the remaining five complainants can be dismissed, as none of them is alleged to either be the actual former employer of DOE, or liable as a nominal employer pursuant to a *Papa* analysis. *Atkins v. Jad Hosiery, Inc.*, No. 99 C 4055, 2000 WL 988534 (N.D. Ill. July 17, 2000). The Illinois Secretary of State records reflect that each named corporation was incorporated independently and at various times. Additionally, Defendants' LR 3.2 Statements confirm that

no Defendant corporation has a corporate parent or a corporate shareholder. This Court can take judicial notice of matters of public record without converting Defendants' 12(b)(6) Motion to a Motion for Summary Judgment. *Minch v. City of Chicago*, 486 F.3d 294, 299 (FN3)(7th Cir. 2007). Therefore, Count I could be dismissed pursuant to FRCP 12(b)(6) for all Defendants with the exception of ADDISON, based upon the allegations of Plaintiff's Complaint. *Adkins, id.* at *4.

IV. Answer of LM II

Notwithstanding Plaintiff's failure to state which of the six named corporate Defendants actually employed DOE, LM II has filed an answer admitting that it alone employed both DOE and LOPEZ during the relevant time frame alleged with Plaintiff's Complaint and even submits as an exhibit their 2006 W-2 forms as an admission on that fact. LM II has also admitted at paragraph 14 that it is "an employer as that term is defined under the Civil Rights Act of 1964, as Amended, 42 U.S.C. §2000(e)(b)." These admissions by LM II establish that it and it alone is responsible to contest liability for DOE's claims. DOE's allegation at paragraph 33 that ADDISON splintered business enterprises into multiple corporations to defeat Federal anti-discrimination laws falls on its face in light of LM II's admissions that it employed DOE and LOPEZ, and that it had the requisite number of employees to be subject to Title VII. As a matter of law, nobody else, not even ADDISON, can be responsible for LM II under a *Papa* analysis when LM II as DOE's employer does not seek to avoid liability under the Federal anti-discrimination laws.

V. Count I Must be Dismissed as to All Defendants Under a *Papa* Analysis with the Exception of LM II

None of the remaining Defendants can withstand a *Papa* analysis for nominal employer liability. Plaintiff makes no allegation under the first small-employer exception that traditional

conditions for piercing the corporate veil exist. The second exemption for the creation of entities to avoid liability under the Federal anti-discrimination laws falls on its face based upon LM II's admission that as DOE's employer, it has the requisite number of employees and therefore must defend DOE's Complaint. No allegations are made by Plaintiff which remotely suggest that FERNANDEZ, LM I, LM III or BMTI directed any discriminatory act, practice or policy. Therefore, it is without question that those Defendants must be dismissed pursuant to FRCP 12(b)(6). In paragraph 34, Plaintiff asserts a vague "integrated enterprise" theory. However, the Seventh Circuit no longer applies the "integrated enterprise" test to Title VII claims. *Worth v. Tyer*, 276 F.3d 249, 260 (7th Cir. 2001). *Papa* abrogated the "single employer" test, finding it too "vague" to be applied consistently. *Labouve v. The Boeing Company*, 387 F.Supp.2d 845, 850 (N.D. Ill. 2005). Therefore, even though Plaintiff makes additional allegations regarding ADDISON which are not made against any other named Defendant, even ADDISON is subject to 12(b)(6) dismissal. Since none of the *Papa* exceptions apply, all non-employer Defendants are subject to dismissal pursuant to FRCP 12(b)(6). To the extent this Court deems otherwise as to Defendant ADDISON or any other entity, Defendants seek leave to file a Motion for Summary Judgment on this issue and on an expedited basis, as it can easily establish that Plaintiff's allegations are baseless. ADDISON is not the parent corporation of LM II (see LM II LR 3.2 Statement) and ADDISON had no control over LOPEZ or LM II.

VI. Count II Negligence - Hiring, Supervision and Retention

The Illinois Worker's Compensation Act (IWCA) contains an exclusivity provision, barring employees from pursuing "common law claims in statutory actions against employers for accidental injury sustained during the course of employment." 820 ILCS 305/5(a); *Contreras v. Suncast Corp.*, 129 F.Supp.2d 1173, 1183 (N.D. Ill. 2001). Plaintiff's claims are barred by the

exclusivity doctrine of the IWCA. *DeFronzo v. Conopco, Inc.*, 357 F.Supp.2d 1062, 1064 (N.D. Ill. 2005).

Plaintiff's Count II is also barred by preemption created by the Illinois Human Rights Act. 775 ILCS 5/8-111(c). *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill.2d 507, 639 N.E.2d 1273, 1276 (1994); *Krocka v. City of Chicago*, 203 F.3d 507, 516 (7th Cir. 2000). In paragraphs 48 and 49 of Plaintiff's Complaint, Plaintiff specifically asserts that Defendants were negligent in preventing LOPEZ from engaging in acts of sexual harassment to Plaintiff and other female employees. When a claim of negligence is predicated upon the prohibition against sexual harassment, that claim is preempted by the Illinois Human Rights Act. *DeFronzo*, 357 F.Supp.2d at 1065.

As a result of the exclusivity provision of the Illinois Worker's Compensation Act and the preemption of the Illinois Human Rights Act, all Defendants are entitled to dismissal of Count II. In addition thereto, Plaintiff states no facts which assert nominal employer liability of any entity based upon the Illinois doctrine of piercing the corporate veil. This constitutes a third reason why FRCP 12(b)(6) dismissal of Count II is appropriate.

VII. Count III – Negligent Infliction of Emotional Distress

As set forth above, LM II was the employer of DOE and LOPEZ. Plaintiff has made no piercing the corporate veil allegation under Illinois law against any other named Defendant or asserted any other successor liability theory. Therefore, Count III must be dismissed for all Defendants with the exception of LM II.

Count III must also be dismissed against all other Defendants because the claim is preempted by the IWCA. *DeFronzo*, 357 F.Supp.2d at 1064. Additionally, Plaintiff's Count III is inextricably linked with her claims of sexual harassment governed and preempted by the

Illinois Human Rights Act (IHRA). *Griffin v. Sutton Ford, Inc.*, 452 F.Supp.2d 842, 845 (N.D. Ill. 2006); *Thomas v. L'Eggs Prods., Inc.*, 13 F.Supp.2d 806, 810 (C.D. Ill. 1998). The core of DOE's claim is sexual harassment which causes preemption. *Smith v. Chicago School Reform Bd.*, 165 F.3d 1142, 1151 (7th Cir. 1999). Plaintiff asserts no facts throughout her Complaint that are not inextricably linked to sexual hostile work environment or *quid pro quo* sexual harassment governed by the IHRA. *See, Krocka*, 203 F.3d at 517; *Beard v. City of Chicago*, 299 F.Supp2d at 874-5.

VIII. Count IV – Intentional Infliction of Emotional Distress

Once again, all of the Defendants with the exception of LM II are entitled to dismissal under Count IV because Plaintiff fails to allege any basis for piercing the corporate veil or successor liability under Illinois law. As a second basis for dismissal, the alleged conduct of LOPEZ which even if intentional is barred by the exclusivity doctrine of the IWCA. *Hunt-Golliday v. Metro. Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1016 (7th Cir. 1997). There is no allegation that any Defendant commanded or expressly authorized LOPEZ to engage in such conduct and therefore Plaintiff's claim cannot escape IWCA exclusivity. *Contreras*, 129 F.Supp.2d at 1183. Third, all Defendants are entitled to dismissal of Count IV based upon IHRA preemption. *Griffin v. Sutton Ford, Inc.*, 452 F.Supp.2d at 845; *Thomas*, 13 F.Supp.2d at 810; *Smith*, 165 F.3d at 1151. Although allegations of willfulness may well exist against LOPEZ, the highest *mens rea* alleged of the corporate Defendants is only that of negligence. No corporate Defendant is alleged to have done anything willful and Plaintiff's factless allegation at paragraph 62 suggesting otherwise, no longer withstands scrutiny under the modern pleading standard in Federal courts. A plaintiff must "provide the grounds of his entitlement to relief" by at least saying enough to "raise a right to relief above the speculative

level." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). A complaint must do more than leave open the possibility that the plaintiff might later plead some new claim that would warrant relief. *Vancrete v. Appelman*, 2008 WL 34155 (7th Cir. 2008). Finally, all Defendants move to strike Plaintiff's claim for punitive damages which is not authorized under Illinois law on a claim for IIED. *Knierim v. Izzo*, 22 Ill.2d 73, 78, 174 N.E.2d 157, 165 (1961). Punitive damages are not available for Plaintiff's theory because the outrageous quality of Defendants' conduct forms the basis of the action and thus rendition of compensatory damages is sufficiently punitive. *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1, 5 (7th Cir. 1972).

IX. Count V – Willful and Wanton Misconduct

In Count V, Plaintiff interposes claims of negligence (paragraphs 66, 72 and 73) with claims which purport to allege willful and wanton misconduct. For the same reasons as set forth above, only DOE's actual employer, LM II, can potentially be held responsible for this and the other common law counts. Equally applicable is the exclusivity doctrine of the IWCA to a claim for willful and wanton misconduct. *Arnold v. Janssen Pharmaceutica, Inc.*, 215 F.Supp.2d 951, 958 (N.D. Ill. 2002); *DeFronzo*, 357 F.Supp.2d at 1063-4. Also applicable is the preemption doctrine of the IHRA. Plaintiff's allegations are all inextricably linked to a sexual harassment hostile work environment claim or a *quid pro quo* sexual harassment claim which creates preemption. *Geise*, 639 N.E.2d at 1276; *Griffin*, 452 F.Supp.2d at 845; *Thomas*, 13 F.Supp.2d at 810. Although allegations of willfulness may well exist against LOPEZ, the highest *mens rea* of the corporate Defendants is only that of negligence. No corporate Defendant is alleged to have done anything willful and Plaintiff's factless allegations suggesting otherwise, no longer withstand scrutiny under the post *Bell Atlantic* pleading standard in Federal courts. Finally, although DOE may have an ability to claim punitive damages against LOPEZ should she ever

sue him, DOE's claim of vicarious liability does not support a claim for punitive damages against any corporate entity. *Mattyasovsky v. West Town Bus Co.*, 61 Ill.2d 31, 36-7 (1975); Restatement (Second) of Agency, §217c. Plaintiff does not allege any basis for vicarious punitive damages for the acts of LOPEZ.

X. Count VI – Assault and Battery

In paragraph 77, Plaintiff makes a strange allegation that LOPEZ acted as an "alter ego" of Defendant. This baseless conclusion has no support and is contradicted by paragraph 26, which acknowledges that LOPEZ was merely a "supervisor." An "alter ego" imports substantially more under Illinois law such as ownership, co-mingling of assets and an interrelationship between personal and corporate activities. *MacAluso v. Jenkins*, 95 Ill.App.3d 461, 464, 420 N.E.2d 251, 255 (2d Dist. 1981). All Defendants with the possible exception of LM II are entitled to dismissal of Count VI because LOPEZ was only the agent of LM II.

All Defendants are also entitled to dismissal of Count VI pursuant to the exclusivity doctrine of the Illinois Human Rights Act. 820 ILCS 305/5(a); *Hunt-Golliday*, 104 F.3d at 1016; *Contreras*, 129 F.Supp.2d at 1183. (Employer must command or expressly authorize intentional conduct to escape IWCA exclusivity.) Paragraphs 78 through 80 clearly allege negligence which is IWCA preempted. *DeFronzo*, 357 F.Supp.2d at 1064-65. Count VI is also preempted by the IHRA. 775 ILCS 5/8-111(c); *Griffin*, 452 F.Supp.2d at 845; *Thomas*, 13 F.Supp.2d at 810. Finally, although DOE may have an ability to claim punitive damages against LOPEZ should she ever sue him, DOE's claim of negligence does not support a claim for punitive damages against any corporate entity based upon the *mens rea* of negligence as alleged in paragraphs 78 through 80.

XI. Only LM II Could Possibly Have Vicarious Liability for the Acts of Lopez

The non-employer Defendants of FERNANDEZ, LM I, LM III, ADDISON and BMTI had no affirmative duty to control LOPEZ and therefore cannot be responsible for his alleged tortious misconduct. *Hills v. Bridgeview Little League Ass'n.*, 195 Ill.2d 210, 235-9, 745 N.E.2d 1166 (2000). An entity is liable for the tort committed by another only if the tort was committed in furtherance of his agency or motivated to serve his master. *Doe v. City of Chicago*, 360 F.3d 667, 670 (7th Cir. 2004). There is no allegation that the conduct of LOPEZ was in furtherance of the business of FERNANDEZ, LM I, LM III, ADDISON or BMTI and therefore all of those Defendants are subject to dismissal of DOE's state law claims on that basis.

XII. The Conduct of LOPEZ Was Not In Furtherance Of the Business of LM II or Any Other Defendant

All Defendants, including LM II, are entitled to dismissal of Plaintiff's claims that LOPEZ's actions were in furtherance of any business of any Defendant. *Webb By Harris v. Jewel Companies, Inc.*, 137 Ill.App.3d 1004, 1008, 485 N.E.2d 409, 412 (1st Dist. 1985). Under Illinois law, sexual misconduct is generally not within the scope of employment. *Dorsey v. Givens*, 209 F.Supp.2d 850, 852-53 (N.D. Ill. 2001). Conduct such as criminal sexual abuse, by its very nature, precludes a conclusion that it was committed within the scope of employment. *Deloney v. Board of Educ. of Thornton Tp.*, 281 Ill.App.3d 775, 783-4, 666 N.E.2d 792 (1996). In the context of *respondeat superior* liability, the term "scope of employment" excludes conduct by an employee that is solely for the benefit of the employee, such as an act of sexual assault. *See, Gambling v. Cornish*, 426 F.Supp. 1153 (N.D. Ill. 1977) (sexual assault by police officer outside scope of employment which precludes vicarious liability to employer); *Randif v. High Ridge YMCA*, 170 Ill.App.3d 962, 524 N.E.2d 966 (1988) (sexual assault of child by teacher is

deviation from scope of employment); *Bates v. Doria*, 150 Ill.App.3d 1025, 502 N.E.2d 454 (1986) (no vicarious liability for sexual assault). Therefore, under Illinois law all of the Defendants are not responsible for the alleged criminal conduct of LOPEZ.

Conclusion

In conclusion, all of Plaintiff's claims should be dismissed pursuant to FRCP 12(b)(6) for the multiple reasons set forth above, with the exception of Plaintiff's claim of sexual harassment under Title VII against LM II. To the extent that the Court determines that this Motion must be converted to a Motion for Summary Judgment on the issue of affiliated corporate liability, Defendants seek to file such a motion on an expedited basis to adjudicate that limited issue.

Respectfully submitted,

/s/Glenn R. Gaffney
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Attorney for Defendants

CERTIFICATE OF SERVICE

Justin R. Gaffney certifies that on March 28, 2008 he e-filed the above and foregoing via the Case Management/Electronic Case Filing system with the Clerk of the U.S. District Court. The parties may access this filing through the Court's electronic filing system, and notice of this filing will be sent to the following parties by operation of the Court's electronic filing system.

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